March, 1994

HONOR ROLL

411th Session, Basic Law Enforcement Academy - November 2, 1993 through February 1, 1994

President:	*Officer Shandy D. Cobane - Seattle Police Department*
Best Overall:	*Deputy Craig Montgomery - Kitsap County Sheriff's Department*
Best Academic:	*Deputy Craig Montgomery - Kitsap County Sheriff's Department*
Best Firearms:	*Officer Roy A. Galusha - King County Police Department*

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Corrections Officer Academy - Class 191 - January 3 through January 28, 1994

Highest Overall:	*Officer Patrick L. Bloomer - Oroville City Jail*
Highest Academic:	*Officer Merrilea Mount - Snohomish County Corrections*
	Officer Harvey L. Brown - Columbia County Sheriff's Office
Highest Practical Test:	*Officer Patrick L. Bloomer - Oroville City Jail*
Highest in Mock Scenes:	*Officer Johan Kingsberry - Washington State Reformatory*
	Officer Sandra L. Nourse - Washington Corrections Ctr for Women
	Officer Pamela O'Brien - Washington State Reformatory
Highest Defensive Tactics:	*Officer Brian W. Cornehl - Chelan County Regional Jail*

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MARCH LED TABLE OF CONTENTS

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BRIEF NOTE FROM THE U.S. SUPREME COURT

DUE PROCESS CLAUSE REQUIRES NOTICE AND HEARING BEFORE SEIZING REAL PROPERTY UNDER DRUG FORFEITURE LAWS -- In U.S. v. Good, 54 CrL 2009 (1993) the U.S. Supreme Court rules, 5-4, that due process protections of the Federal constitution require that, before real property may be seized under drug forfeiture laws, the owner of the property must be given notice and a hearing. This ruling applies to drug law seizures by all federal, state and local law enforcement agencies. The Court does not specify exactly what kind of hearing will satisfy due process, but it appears that the Court anticipates the calling of live witnesses who will be subject to cross-examination.

The majority opinion distinguishes prior case law which holds that seizures of personal property may be effected under drug forfeiture laws without prior notice or a prior hearing. The basis for the distinction is the mobility of personal property. Seizure of personal property without prior notice and hearing is justified, the majority declares, because the owner could otherwise thwart seizure and forfeiture by removing or hiding the personal property after notice. There is no such risk with real property, the majority declares.

Result: Ninth Circuit Court of Appeals decision on due process issue affirmed; case remanded to United States District Court in Hawaii for further proceedings, apparently a hearing on the seizure and forfeiture issues.

LED EDITOR'S COMMENT: The decision in Good means that Washington state's drug forfeiture law, chapter 69.50 RCW, must be read as requiring notice and hearing prior to real property forfeiture, notwithstanding the State Supreme Court's ruling in the Tellevik case at 120 Wn.2d 68 (1992) Jan. '93 LED:08. Contrary to propaganda one may see or hear from the criminals' lobby and others regarding the implications of this case, it does nothing to change any other current burdens or standards of proof in forfeiture proceedings.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

SCHOOL ZONE SENTENCE ENHANCEMENT FOR ILLEGAL DRUG POSSESSION IN ZONE WITH INTENT TO DELIVER DOES NOT REQUIRE PROOF OF INTENT THAT DELIVERY OCCUR WITHIN THE ZONE -- In State v. McGee, 122 Wn.2d 783 (1993) the State Supreme Court interprets RCW 69.50.435(a), which at the time of McGee's drug offense provided:

> Any person who violates RCW 69.50.401(a) by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under that subsection to a person in a school . . . or within one thousand feet of the perimeter of the school grounds is punishable by a fine of up to twice the fine otherwise authorized . . . or by imprisonment of up to twice the imprisonment otherwise authorized . . . or by both such fine and imprisonment.

[Emphasis added by LED Editor]

McGee argued that in a drug possession case the enhanced sentence provision requires that the

offender intend that the delivery itself be accomplished within the school zone. However, by a 5-4 vote (Dolliver, Durham, Andersen, Brachtenbach and Guy in the majority and Utter, Smith, Madsen and Johnson in the dissent), the State Supreme Court rejects McGee's argument. The majority reasons that legislative intent behind the school zone law is in significant part to emphasize the prohibition against possession of more than personal use amounts of drugs within school zones, "thereby decreasing the likelihood of violence and the risk drugs will find their way into the hands of minors." Thus, possession in the zone with intent to effect delivery anywhere, not just intent to effect delivery within the zone, merits an enhanced penalty, the majority justices conclude.

Result: affirmance: (a) of King County Superior Court conviction for possession of a controlled substance and school zone sentence enhancement, and (b) of Court of Appeals decision affirming Superior Court judgment.

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WASHINGTON STATE COURT OF APPEALS

SPANISH TRANSLATION OF MIRANDA WARNINGS ADEQUATE

State v. Teran, 71 Wn. App. 668 (Div. III, 1993)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On March 12, 1991, Yakima police officers executed a search warrant at Mr. Teran's home and recovered a brick of cocaine weighing 96.2 grams, several plastic baggies containing cocaine, drug paraphernalia, and $3,353 cash. James Robinson, special agent for the United States Immigration and Naturalization Service, assisted in the search.
>
> As Agent Robinson entered the residence, officers were advising Mr. Teran of his Miranda warnings using a Spanish cassette tape. In the presence of the three officers, Agent Robinson gave Mr. Teran the Miranda warnings in Spanish and asked him if he understood the warnings. Mr. Teran answered coherently, with appropriate responses, in Spanish and in English. He agreed to answer Agent Robinson's questions and stated that he had obtained the cocaine at the park and was going to pay for it after he sold it.
>
> Mr. Teran was charged with possession of cocaine with intent to deliver. At a CrR 3.5 hearing, the court interpreter, who had prepared the Spanish Miranda tape, testified that the tape uses the word "proporcionar" rather than "dar", the more common Spanish word for "to give or supply". She said the "proporcionar" is a formal manner of speech, used by educated persons; she has not heard the word "proporcionar" used.
>
> Agent Robinson acknowledged that "proporcionar" is a complex word, but stated that it was his habit to ask an accused if he or she needed an explanation. He testified that he has "often been told that they don't understand, at which time [he] explain[s] it in more everyday language." Agent Robinson testified that Mr. Teran acknowledged that he understood the warnings and agreed to answer questions.

Mr. Teran testified that he had only a third grade education and came to the United States from Mexico in 1979. He said that he did not hear the cassette tape the officers played because he was in another room. Mr. Teran testified that the officers did not ask him if he understood the tape. He also stated that Agent Robinson did not inform him that he had a right to an attorney free of charge and did not explain the other Miranda warnings. Mr. Teran said that Agent Robinson did not correctly interpret his responses.

The court found that Mr. Teran was present when the cassette tape was played in its entirety but was not asked if he understood his rights after the tape was played. The court concluded that Mr. Teran's statements would only be admissible if Mr. Teran had voluntarily waived his rights after the Miranda warnings were read to him by Agent Robinson. The court found that Agent Robinson read Mr. Teran his rights from a card he carried and had asked Mr. Teran if he understood each warning. Mr. Teran indicated he understood each right. The court denied the motion to suppress and a jury convicted Mr. Teran of possession of cocaine with intent to deliver.

ISSUE AND RULING: Did the trial court err in finding that Teran knowingly and intelligently waived his rights? (ANSWER:No) Yakima County Superior Court conviction for possession of a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A suspect who has been advised of his Miranda rights against self-incrimination may waive the rights, provided the waiver is made knowingly and intelligently. The State must establish that the defendant was fully advised of his rights, understood them, and knowingly and intelligently waived them.

Whether a confession is voluntary and therefore admissible is determined by examining the totality of the circumstances. "The test is if the defendant's will to resist was so overborne as to bring about a confession not freely self-determined." Because of the constitutional rights at issue, a reviewing court makes an independent evaluation of the evidence.

A valid waiver may be either expressly made or implied when the record reveals that the "defendant understood his rights and volunteered information after reaching such understanding." A waiver may be inferred when "the record shows that a defendant's answers were freely and voluntarily made without duress, promise or threat and with a full understanding of his constitutional rights."

Although a suspect's ability to make a knowing and intelligent waiver of his Miranda rights may be inhibited by language barriers, a valid waiver may be effected when a defendant is advised of his Miranda rights in his native tongue and claims to understand such rights. Further, the translation of Miranda from English to Spanish need not be perfect -- it is sufficient that the defendant "understands that he does not need to speak to police and that any statement he makes may be used against him." United States v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990), cert. denied, 499 U.S 908 (1991).

> Here, the court found that "Agent Robinson went through and read each individual right to the defendant and based on habit asked after each one if the defendant understood." The court also found that "[t]he defendant indicated he did understand each one of the individual rights." Agent Robinson testified that Mr. Teran indicated that he understood the Miranda rights he had been read. Three other officers were present during the exchange. Using coherent speech, Mr. Teran responded to the officers in Spanish and sometimes in English. He indicated that he understood the officers and did not demonstrate any confusion with the word "proporcionar". His statement was not the result of coercion. The court's findings are supported by substantial evidence. The court did not err in ruling that Mr. Teran knowingly and intelligently waived his rights.
>
> The conviction is affirmed.

[Emphasis added; most citations omitted]

LED EDITOR'S NOTE: The Teran decision is the first reported Washington decision on foreign language translation of Miranda. However, the decision appears to be well-grounded in case law from other jurisdictions. The Court of Appeals cites a federal court decision, U.S. v. Hernandez, as support for the proposition that the translation of Miranda need not be perfect. As is stated in Teran, Hernandez holds in essence that Miranda warnings are adequate if they successfully convey to the defendant the basic understanding that he need not speak to police and that any statement he makes may be used against him. Other federal cases supporting this view include U.S. v. Yunis, 859 F.2d 953 (D.C. Cir. 1988); Perri v. Director Dept. of Corrections, 817 F.2d 448 (7th Cir. 1987); U.S. v. Gonzales, 749 F.2d 1329 (9th Cir. 1984); and U.S. v. Boon San Chong, 829 F.2d 1572 (11th Cir. 1987).

ELECTRONIC SURVEILLANCE UNDER RCW 9.73.230 -- POLICE CHIEF'S 24-HOUR EXTENSION FOR ONE-PARTY-CONSENT INTERCEPT CANNOT BE PREAPPROVED

State v. Gonzalez, 71 Wn. App. 715 (Div. III, 1993)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On January 30, 1991, [an officer of a Washington law enforcement agency] applied for and obtained an authorization for an evidence intercept pursuant to RCW 9.73.230, which permits a 24-hour intercept provided certain specified conditions are met. The authorization was signed by the chief of police at 1:20 p.m. on January 30. It authorized an evidence intercept from 1 p.m. on January 30 until 11:55 p.m. on January 31 (24 hours would have ended at 1:20 p.m. on January 31).
>
> Armed with the authorization, law enforcement officers recorded conversations between [the officer] and drug contacts. [The officer] began his intercept with a "body mike" at 12:20 p.m. on January 31. There was no request for an extension of the authorization and the incriminating evidence against Avelino Villegas, Martin Gonzalez and Espiridion Villegas was recorded after 1:20 p.m. on the 31st.

> Mr. Gonzalez, Mr. A. Villegas and Mr. E. Villegas were charged by information with conspiracy to deliver a controlled substance (cocaine). Prior to trial, the defendants moved to suppress the statements of the participants to the recorded conversations all of which followed the 24-hour authorized period. This motion was granted by the trial court and resulted in dismissal of the State's case . . .

[Some text deleted]

ISSUE AND RULING: May a chief authorizing a drug-deal electronic intercept order under RCW 9.73.230 preapprove a 24-hour extension of his order? (ANSWER: No) Result: Yakima County Superior Court order suppressing statements and dismissing prosecution affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Washington generally prohibits the interception, recording, or divulging of private communications without first obtaining the consent of the parties to that conversation. RCW 9.73.030. Limited exceptions to this general prohibition, however, are authorized. See generally RCW 9.73.090, .095,.210, .230.
>
> At issue here is the application of RCW 9.73.230, which both sanctions police authorization of 1-party intercepts and permits the admission of the results thereof in subsequent judicial proceedings. Statutory requirements for the intercept are extensive and specific: (1) at least one party must consent; (2) the officer seeking authorization must show probable cause the intercepted conversations will involve illegal drug activity; (3) written reports must be prepared indicating all requirements for authorization have been met, and must include: the names of all parties who are expected to be involved (if not confidential informants); details of the expected time, place and subject matter of the intercept; and whether the officer attempted to get judicial authorization for the intercept; and (4) the authorization is valid for only 24 hours after it is signed by the chief officer, although authorization may be extended no more than twice for additional consecutive 24-hour periods. These extensions of authorization may be based upon the same probable cause as the first authorization, but each must be separately signed by the authorizing officer. RCW 9.73.230.
>
> Information obtained in violation of RCW 9.73.030 is generally inadmissible. RCW 9.73.050; State v. Salinas, 121 Wn.2d 689 (1993) **[Nov. '93 LED:08]**.
>
> The State advances an imaginative theory that the chief's authorization, for what amounted to a 34-hour window of authority, was in effect a "preapproved" extension which substantially complied with the requirements of RCW 9.73.230(5). . . . **[The Court here discusses prior cases on "substantial compliance under othe sections of chapter 9.73 RCW." LED Ed.]** The violation here is neither technical nor insubstantial.
>
> "Preapproval" of an extension of the authorization is not authorized by the statute and we decline the invitation to add such a procedure judicially. By including specific procedural instructions, the Legislature sought to limit abuse of what amounts to self-authorized electronic surveillance. "Where the meaning of the

> statute is clear from the language of the statute alone, there is no room for judicial interpretation." The trial court properly held that all information obtained after the 24-hour period of authorization was inadmissible at trial.

[One footnote, some text, some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **CRIMINAL DISCOVERY RULES -- HOME ADDRESSES OF COOPERATING STATE'S WITNESSES PROTECTED FROM DISCLOSURE TO DEFENSE FOR "PERSONAL SAFETY" REASONS --** In State v. Mannhalt, 68 Wn. App. 757 (Div. I, 1992), Guenter Mannhalt loses his challenge to re-trial convictions for conspiracy (one count); first degree robbery (five counts), and possessing stolen property (three counts).

Mannhalt was a modern-day Fagan operating out of a downtown Seattle donut shop. In 1980 he was prosecuted for recruiting a number of young men to commit armed robberies and split the proceeds with him. His first trial in 1981 resulted in multiple convictions. See State v. Mannhalt, 33 Wn. App. 696 (Div. I, 1983) April '83 LED:06. However, he eventually won a re-trial in a Federal habeas corpus action. Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988). He was retried in 1990.

Prior to his 1990 retrial, he moved to compel discovery of background information, the current addresses and the telephone numbers of four cooperating witnesses who were expected to and eventually did testify that Mannhalt had recruited them to commit the robberies, had supplied them with guns and transportation, and had shared in the robbery proceeds. After considering the State's evidence regarding the safety concerns of the witnesses, the trial court entered a protective order reading in part as follows:

> 1. The state has made a showing of cause that the physical safety of the four above-named witnesses is at risk if the defendant . . . were to learn their new names (if any), current addresses and telephone numbers.
> 2. The state has and will continue to provide to the defense criminal conviction information and impeaching information about each of these witnesses and will provide the defendant's attorney with the opportunity to interview each of these witnesses before trial; and
> 3. If the defendant specifies additional impeaching information about any of these four witnesses that he has not been able to obtain, the court will consider whether that specified information should be available to the defendant in discovery, and if so the court will consider what orders are necessary to provide that information . . .

Under the following analysis, the Court of Appeals rules that the trial court's protective order was lawful:

> The United States and Washington Constitutions guarantee an accused the right to be confronted with the witnesses against him. The right of confrontation includes the right of cross examination. A permissible purpose of the right of cross examination is to identify the witness "with his community so that independent testimony may be sought and offered of his reputation for veracity in his own

neighborhood". The Alford Court reversed a conviction where the trial court denied the accused the opportunity to elicit the place of residence of an important prosecution witness.

An accused's right to confrontation is not absolute. In a concurring opinion in Smith v. Illinois, 390 U.S. (1968), Justice White stated that, to the areas enumerated in Alford exceeding the bounds of proper cross examination, he would add "those inquiries which tend to endanger the personal safety of the witness." Justice White's "personal safety exception", though never adopted by a majority of the Supreme Court, has been widely cited and applied by lower federal courts. People v. Thurman, 787 P.2d 646, 652 (Colo. 1990). The Ninth Circuit Court of Appeals also utilizes it.

Washington courts have neither adopted the exception nor addressed it. A number of states have adopted the exception. People v. Thurman [above] which reaffirmed principles set out in an earlier Colorado case, is instructive:

> Placing the initial burden on the witness or prosecution, we stated that "the danger claimed by the witness must in some way relate to the particular defendant. There must be a nexus such that the witness legitimately fears reprisal from the defendant or his associates." . . . ""[A]fter the witness [has] made a showing that his safety would be endangered if he answered," the defendant has the duty to show that the information sought has "some materiality."

In the present case, Sam Kline, Eric Taa, Delbert Sheeler and Jeff Counts all expressed reluctance to testify out of fear for their own safety and the safety of their families. Sheeler and Taa were fearful after receiving "hang-up" calls. Counts too expressed "great fear" at the prospect of testifying against Mannhalt at the later trial. During the first trial, there may have been a $50,000 contract out on Taa's life because of his willingness to testify. Based on several affidavits and on the statements of counsel, the trial court granted a protective order pursuant to CrR 4.7(h)(4).

Although the State did not present overwhelming evidence of threats, evidence was submitted to the trial court to support the finding that various witnesses' safety was in danger. The trial court was in the best position to determine the reality of the threats, and the record reflects sufficient basis for the findings.

The trial court provided defense counsel with copies of the criminal histories of each witness, and defense counsel interviewed each of the State's witnesses who were fearful for their safety. The prosecutor provided notes of interviews with Taa and Sheeler to defense counsel. The only information deleted from the criminal histories was that which would lead to knowledge of their whereabouts, such as the communities in which they committed crimes after 1981. During direct and cross examination, the witnesses freely admitted their various misdeeds. The witnesses did not appear to conceal their history of illegal acts -- indeed, the prosecutor appears to have encouraged the witnesses' candor.

Given this degree of disclosure, we find the defendant suffered no serious

prejudice to his ability to defend himself, and the trial court did not err in issuing the protective order.

[Some citations omitted]

Result: King County Superior Court convictions for conspiracy (1 count), first degree robbery (5 counts) and possessing stolen property (3 counts) affirmed.

(2) **CORPUS DELICTI OF ATTEMPTED FIRST DEGREE MURDER ESTABLISHED --** In State v. Vangerpen, 71 Wn. App. 94 (Div. I, 1993) the Court of Appeals rejects the defendant's argument that his statements to police were not lawfully admitted in evidence because the State failed to establish the corpus delicti of the charged crime, attempted first degree murder. The corpus delicti of attempted murder in the first degree is established, the Court of Appeals explains, by evidence that strongly corroborates the perpetrator's premeditated intent to kill someone. The Court of Appeals holds that the following facts established the corpus delicti:

> On July 20, 1991, at 2:15 a.m., Officer Nielsen of the Bothell Police Department stopped Vangerpen for speeding. After approaching the vehicle, Officer Nielsen smelled alcohol and asked Vangerpen if he had been drinking. Officer Nielsen also asked Vangerpen for his driver's license. Officer Nielsen testified that he then observed Vangerpen's left hand moving toward the inside of his right leg, where Officer Nielsen thought he saw the butt of a handgun.
>
> Officer Nielsen then "jumped into the car and grabbed the gun from underneath [Vangerpen's] leg". Officer Nielsen testified that the gun was a ".32 caliber" revolver, and that the revolver was "cocked" when he grabbed it.
>
> Officer Nielsen radioed for backup. Officers Stuveland and Lawson responded to the call. Officer Stuveland exited his car, drew his gun, told Vangerpen to turn his car off and ordered him and his passenger to get out of the car and onto the ground.
>
> After Officer Lawson arrived, he handcuffed Vangerpen. At trial, Officer Lawson testified that Vangerpen stated, "I should have killed the cop when I had the chance." Officer Nielsen also testified that Vangerpen stated, "I should have killed him when I had the chance."
>
> Officer Nielsen testified that, after he had advised Vangerpen of his Miranda rights, Vangerpen stated that he was planning to kill Officer Nielsen if he asked him about "drinking and driving" and that he cocked his gun ahead of time for that purpose. Officer Nielsen testified that Vangerpen also stated that he should have shot the officer when he approached the car.

Result: King County Superior Court conviction for attempted murder in the first degree reversed on other grounds not addressed here (failure of the State to include all elements of the crime in the charging document); charges dismissed, but State may lawfully refile the charge of attempted first degree murder.

LED EDITOR'S NOTE:

For other recent cases on the corpus delicti rule, see State v. Smith, 115 Wn.2d 775 (1990) March '91 LED:06 (corpus delicti for attempted first degree murder); Bremerton v. Corbett, 106 Wn.2d 569 (1986) Nov. '86 LED:03 (corpus delicti for DWI); State v. Neslund, 50 Wn. App. 531 (Div. I, 1988) Nov. '88 LED:12 (corpus delicti for criminal homicide).

(3) **OFFICER PROPERLY TESTIFIED AS AN EXPERT THAT DWI ARRESTEE HAD BEEN "OBVIOUSLY INTOXICATED"** -- In City of Seattle v. Heatley, 70 Wn. App. 573 (Div. I, 1993) the Court of Appeals rules that a police officer's testimony that at the time of the arrest the DWI defendant had been "obviously intoxicated" and "could not drive a motor vehicle in a safe manner" was proper expert testimony under the evidence rules. Result: affirmance of King County Superior Court ruling affirming Seattle Municipal Court convictions for DWI and negligent driving.

(4) **NONCOMMISSIONED POLICE PERSONNEL MUST BE COVERED BY CIVIL SERVICE** -- In Teamsters v. City of Moses Lake, 70 Wn. App. 404 (Div. III, 1993) the Court of Appeals rules unlawful a Moses Lake ordinance which excludes from civil service coverage the agency's noncommissioned personnel (clerks, communications officers and a utility officer). The Court of Appeals holds that all full-time city police department employees are covered by the civil service statute (chapter 41.12 RCW), whether the employees are commissioned or non-commissioned. Result: Kittitas County Superior Court order upholding the ordinance reversed; city directed to provide coverage for all full-time police department employees, commissioned and non-commissioned.

(5) **OFFICER GONE BAD LOSES APPEAL ON ATTEMPTED MURDER, DRUG CONSPIRACY CONVICTIONS; COURT ADDRESSES ISSUES RELATING TO ELECTRONIC SURVEILLANCE LAW, CI FEE STANDARDS, AND FAILURE TO PRESERVE EVIDENCE** -- In State v. Pacheco, 70 Wn. App. 27 (Div. II, 1993) the defendant, Herbert Pacheco, a Clark County sheriff's deputy gone bad, fails in his appeal from convictions of: (1) one "count of conspiracy to commit first degree murder, (2) two counts of attempted delivery of a controlled substance, and (3) two counts of conspiracy to deliver a controlled substance.

The case began as a federal FBI investigation involving a confidential informant (paid $20 per hour plus expenses) who had told the FBI of then-deputy Pacheco's claims of criminal activities. The FBI made some warrantless tape recordings of conversations between the CI and Pacheco; then the Clark County Sheriff's Office was brought into the investigation. The sheriff's office used the FBI tape recordings and other information to obtain Superior Court authority to do further recordings of Pacheco's conversations with the CI. Those conversations occurred in a drug sale sting also involving an FBI undercover agent.

The Court of Appeals rules as follows: (1) ELECTRONIC SURVEILLANCE LAW: the sheriff's office did not violate chapter 9.73 RCW, the state's electronic surveillance statute, when it used FBI tapes which the FBI had obtained without court order prior to sheriff's office involvement in the investigation; as long as the FBI followed the less restrictive federal law (which it did) and was acting on its own when the taping was done (which it was), state and local agencies could use the tapes to obtain a chapter 9.73 court order; (2) CI FEE AGREEMENT: the government's agreement with the CI to pay him an hourly fee, plus expenses and mileage, regardless of the outcome of the case, was not an impermissible "contingent fee" agreement; (3) FAILURE TO PRESERVE EVIDENCE: on the question of whether the failure by police to preserve some evidence should have resulted in the dismissal of charges, the Court of Appeals applies the rule

established in Arizona v. Youngblood, 488 U.S. 51 (1988) Feb. '89 LED:01 (a rule followed by subsequent Washington Court of Appeals and State Supreme Court cases -- see e.g. State v. Ortiz, 119 Wn.2d 294 (1992) Sept. '92 LED:06). The Youngblood/Ortiz rule is that so long as police do not act in bad faith their failure to preserve certain potentially exculpatory evidence will not result in dismissal of charges.

Result: affirmance of Clark County Superior Court convictions of attempted first degree murder (one count), attempted delivery of a controlled substance (two counts) and conspiracy to deliver a controlled substance (two counts).

(6) **EMERGENCY EXCEPTION PERMITS WARRANTLESS SEARCH OF RESIDENCE; HOUSEMATE MURDERER HAS NO STANDING TO CHALLENGE SEARCH OF VICTIM'S SEPARATE BEDROOM** -- In State v. Gocken, 71 Wn. App. 267 (Div. I, 1993) the Court of Appeals rules that a police officer's warrantless entry of a condominium to check on the welfare of an elderly woman resident was lawful.

The elderly woman had shared the condo with Victor Gocken, a 36 year-old man who did odd jobs in lieu of paying rent. The two had a platonic relationship and did not share the woman's bedroom or her bedroom's separate bathroom.

Auburn police received a call to check on the woman's welfare based on her relatives' concern that she had not responded to calls and had not been heard from for several weeks. The responding officers got no answer when they knocked on the door; they went inside without a warrant. Ultimately, they found the woman's dead body in her bathroom; the body was wrapped in garbage bags and a blanket tied with cord.

The Court of Appeals upholds the warrantless search for the woman, ruling that it was justified both subjectively (the officers actually believed the woman's welfare was at risk when they went in) and objectively (their belief was reasonable). Under the emergency exception to the search warrant requirement, the search must be both objectively and subjectively justified, the Court points out, and this search did meet both requirements. [**NOTE: in the interest of saving LED space, the complex facts in this case, recounted in great detail in the Court of Appeals' published opinion, have not been set forth in this LED entry.]**

The Court of Appeals also points out that Gocken had no "standing" to challenge the portion of the search that extended to the victim's bedroom and bathroom. Gocken provided no proof that he had any interest, dominion, or control over the victim's separate bedroom; therefore, he had no standing to challenge that search.

Result: King County Superior Court convictions for first degree murder and eight counts of forgery affirmed.

LED EDITOR'S COMMENT RE "PLAIN VIEW" DISCUSSION IN GOCKEN: The Gocken opinion also discusses the "plain view" doctrine which allows law enforcement officers to make a warrantless seizure of evidence in "plain view". The Court declares that the "plain view" doctrine has three elements, noting the requirements as follows:

> **(1) a prior justification for intrusion; (2) inadvertent discovery of incriminating evidence; and (3) immediate knowledge by the officer that he**

had evidence before him.

The Court is wrong. There is no "inadvertence" requirement under the "plain view" doctrine. See State v. Goodin, 67 Wn. App. 623 (Div. II, 1992) March '93 LED:17, explaining that Horton v. California, 496 U.S. 128 (1990) Aug. '90 LED:02 eliminated this requirement. Under Horton and Goodin, plain view is present so long as there is: (1) prior lawful justification for the warrantless entry into an otherwise protected area (e.g., consent, exigency, warrant authority), and (2) immediate knowledge by the observing officer that an item in plain view is evidence or contraband (probable cause will satisfy the "knowledge" requirement; see Texas v. Brown, 460 U.S. 730 (1983) June '83 LED:01, which appears to set the plain view "knowledge" standard at "probable cause;" but note that there is language in Gocken, citing State v. Bell, 108 Wn.2d 193 (1987) Aug. '87 LED:15, that a "reasonable belief" that an item has evidentiary value is sufficient to satisfy the knowledge requirement).

(7) **POLICE DEPARTMENT'S NO-LIGHT-DUTY POLICY DOESN'T VIOLATE HANDICAP DISCRIMINATION LAWS** -- In Molloy v. Bellevue, 71 Wn. App. 382 (Div. I, 1993) the Court of Appeals addresses the handicap discrimination claim of a police officer employed by the City of Bellevue from 1981 to 1988. The Court holds, among other things, that police department policy requiring that all employees holding noncivilian positions be capable of performing all the duties of a patrol officer is not unreasonably discriminatory; a police department's refusal to waive this policy in order to accommodate a police officer who has suffered an injury and who is incapable of performing all such duties is not unreasonable.

The Court explains:

> An employer has a duty to reasonably accommodate a handicapped employee. This duty entails informing the employee of job openings for which he might be qualified. To establish a prima facie case of discrimination, a handicapped employee must prove (1) that he or she is handicapped, (2) that he or she was qualified to fill vacant positions, and (3) that the employer failed to take affirmative measures to inform the employee of these positions and to determine whether the employee was in fact qualified for them.
>
> . . .
>
> Molloy argues that there were many positions in the police department that were less physically demanding than the position of patrol officer and that Bellevue had a duty to offer him one of these less demanding positions. Bellevue, on the other hand, argues that it is the policy of the Bellevue Police Department that all noncivilian officers must be able to perform *all* the duties of a police officer. Therefore, according to Bellevue, Molloy's disability disqualified him from any police officer positions, even those less demanding than patrol officer. In addition, citing Blumhagen v. Clackamas Cy., 91 Or. App. 510, 756 P.2d 650, review denied, 306 Or. 527 (1988)and Coski v. City & Cy. of Denver, 795 P.2d 1364 (Colo. Ct. App. 1992), Bellevue argues that requiring the police department to accommodate handicapped police officers with positions inside the police department would place an undue burden on the police department.

Blumhagen involved facts very similar to the facts of this case. The plaintiff, a patrol officer, was injured while on duty and was unable to continue working in that position. As in the present case, the police department offered the plaintiff a civilian position that paid approximately half of what she had received as a patrol officer. The plaintiff argued that she should have been retained as a police officer, but placed in a less demanding assignment. The court, however, rejected this claim because (1) the plaintiff did not establish that any positions were available at the time and (2) the positions required that the employee be able to perform patrol duty in order to rotate with patrol officers.

The plaintiff in Blumhagen argued that the department should waive its rotation requirement in order to accommodate her. The court disagreed, stating that the department's policy "allow[ed] deputies to be trained in all areas of the department" and prevented "burnout" among patrol deputies by allowing them to temporarily rotate out of that position while maintaining their normal salary. Thus, the court concluded, accommodating the plaintiff by waiving the requirement that she be able to perform patrol duty would place an undue burden on the police department. **[COURT'S FOOTNOTE: Molloy attempts to distinguish Blumhagen on the ground that it is the Bellevue Police Department's policy not to rotate officers unless the officer requests a transfer. However, by allowing patrol officers to request a transfer, this policy serves the same purposes as the policy in Blumhagen.]**

In Coski, the plaintiff was likewise injured and permanently disabled while working as a patrol officer. When she was denied a position within the police department, she filed a complaint with the Civil Rights Commission. The hearing officer noted that the police department had a policy that "all police officers must be able to fire a weapon and to make a forceful arrest", but concluded that, because some officers did not engage in these activities on a regular basis, they were not essential job functions. The Court of Appeals reversed, stating:

> Police officers must be able to take action to uphold their sworn duty to preserve the peace, protect life and property, and prevent crime. The infrequency with which a particular officer fires a gun or makes an arrest in furtherance of [his or] her duty does not eliminate the need to be capable of performing that duty. Thus, *we conclude that the ability to fire a weapon and to make a forceful arrest is an essential job function because it is reasonable to require this of all police officers.*

[Court's emphasis.] The court also concluded that requiring the police department to waive the forceful arrest policy for the plaintiff was not reasonable because of the large number of police officers that are injured each year. As the court stated:

> If all these officers were retained on the force, the number of positions available for able-bodied officers would eventually be significantly reduced, thereby endangering public safety in an emergency that required full mobilization of the police force.

We believe that the reasoning in Blumhagen and Coski applies equally well to the present case. The policy reasons behind the Bellevue Police Department's rule,

> the rotation policy in Blumhagen, and the "forceful arrest" rule in Coski are identical: All officers must "be able to perform all the duties of a police officer in order to carry out an officer's essential function of protecting the public and preserving the public peace." Although Molloy contends that this policy is discriminatory, he does not elaborate on this argument or cite to any authority that would support this assertion.
>
> We conclude that because of the police department's policy, Molloy's inability to perform his duties as a patrol officer rendered him ineligible for any other noncivilian position in the department. Furthermore, we agree with Bellevue that it had no duty to exempt Molloy from this policy or to create a special position within the department for him. For these reasons, we hold that no genuine issue was raised regarding Bellevue's failure to accommodate Molloy with police employment.

[One footnote, some text, and some citations omitted]

The Court goes on to also reject Molloy's claim that he was not reasonably accommodated by the offer of a non-police position. On this issue, the facts indisputably showed that Molloy flatly rejected such an opportunity and moved to California to try to obtain teaching credentials, the Court holds.

Result: affirmance of King County Superior Court order of summary judgment for City of Bellevue on issues of wrongful termination and failure-to-accommodate-with-police-employment; reversal of Superior Court summary judgment order for Molloy on issue of Bellevue's failure to accommodate Molloy with non-police employment; case dismissed.

(8) **LACK OF KNOWLEDGE OF OFFICER'S STATUS NO DEFENSE TO ASSAULT 3 CHARGE WHERE ASSAULT OCCURS DURING LAWFUL ARREST** -- In State v. Belleman, 70 Wn. App. 778 (Div. I, 1993) the Court of Appeals rejects defendant's argument that he should not have been convicted of assault in the third degree under RCW 9A.36.031(1)(a) because he did not know that the person arresting him as an assault/attempted rape suspect was a law enforcement officer. The Court's analysis is in part as follows:

> Belleman does not assert that his arrest was unlawful, nor could he reasonably, because the facts at the scene suggested Belleman had committed an offense. We conclude that where an arrest is lawful, but the defendant does not know he is being lawfully arrested, he does not have a right to self-defense nor to such an instruction.
>
> RCW 9A.36.031(1)(a) does not explicitly require that the defendant know the arrester is a police officer, something the Legislature could easily have mandated. Not all lawful arrests are made by police officers. For example, a shop owner may arrest a shoplifter. Here, had Officer Kasprzyk merely been a private citizen, he could have lawfully apprehended Belleman under the same circumstances, and Belleman would be subject to prosecution under the same paragraph of the same statute.
>
> Because police officers are not the only ones who can effect a "lawful

apprehension or detention", Belleman's argument reduces itself to what the Goree [State v. Goree, 36 Wn. App. 205 (Div. III, 1993) May '84 LED:04] court already resolved: whether the defendant's knowledge of the lawfulness of his arrest is relevant. The Goree court held that it was not. Similarly, in the present case it makes no difference that Belleman did not know Kasprzyk was a police officer, because a defendant can be charged with third degree assault against non-police officers whose apprehension of the defendant is "lawful". The essential issue thus remains whether the arrest was lawful, not whether Belleman knew Kasprzyk happened to be a police officer. The defendant's subjective assessment is irrelevant, even as to a claim of self-defense.

A holding to the contrary would throw into question every resisting arrest charge where the defendant claims he did not know his arrester was lawfully authorized. Such circumstances might arise where visibility is poor, for example, or where a police officer is undercover, or if an arrestee is simply confused about the identity of his arrester. Singling those arrests out as eligible for a claim of self-defense counters common sense and would hamper legitimate law enforcement. The defendant is still free to argue, as Belleman did, that the arrest was unlawful, or that his arrester used excessive force. **If the arrest turns out to be unlawful, then the defendant has a defense that he resisted the arrest with reasonable force proportionate to the injury about to be received.** [Emphasis by LED Ed.; see LED Ed. comment below.]

Consequently, we find that Belleman had no affirmative defense of self-defense under RCW 9A.36.031(1)(a). . .

[Some citations omitted]

Result: King County Superior Court convictions of third degree assault (against officer) and second degree assault (against original victim to whose report officer had been responding) affirmed.

LED EDITOR'S COMMENT:

As we pointed out in the October '93 LED at 15, there is no right for a citizen generally to use force to resist an arrest even if it is unlawful. The language from Belleman in bold print immediately above fails to state the full elements of the rule. Judge Scholfield, the author of Belleman, also authored Seattle v. Cadigan, 55 Wn. App. 30 (Div. I, 1989), the case he cites to support the statement in bold. In Cadigan, at 37, he explained the right-to-resist rule more carefully and more accurately, as follows:

> **An individual who is illegally arrested by an officer may resist arrest; however, the amount of force used to resist must be reasonable and proportioned to the injury about to be received. "The use of force to prevent even an unlawful arrest which threatens only a loss of freedom is not reasonable."**
>
> **In a lawful arrest, the arrestee may not use physical force against the arresting officer unless the use of excessive force by the officer places the**

> **arrestee in actual danger of serious injury. When use of force is warranted, it cannot exceed that reasonably necessary to protect the arrestee.**

[Citations omitted, emphasis added]

(9) **PUBLIC EMPLOYEE PERFORMANCE EVALUATIONS NOT SUBJECT TO DISCLOSURE UNDER PUBLIC DISCLOSURE ACT** -- In Brown v. Seattle Public Schools, 71 Wn. App. 613 (Div. I, 1993) the Court of Appeals rules that evaluations in an elementary school principal's personnel file, which evaluations did not involve allegations of misconduct, were exempt from public disclosure under RCW 42.17.255. The latter statutory section exempts from public disclosure information about a public employee that would be highly offensive to a reasonable person and that is not of legitimate concern to the public.

LED EDITOR'S NOTE: This ruling appears to apply to performance evaluations of all public employees, including criminal justice personnel.

Result: King County Superior Court ruling compelling disclosure of personnel files reversed.

(10) **SECOND FRISK OF PERSON AT SCENE OF NARCOTICS WARRANT EXECUTION HELD UNREASONABLE --** In State v. Galbert, 70 Wn. App. 721 (Div. I, 1993) the Court of Appeals holds: (1) that officers executing a search warrant at a private residence failed to articulate an adequate basis of concern for their personal safety to justify a second frisk of a person found at the scene, and (2) that there was not probable cause to arrest that person at the time that the second frisk occurred. Therefore, the frisk was not a lawful search incident to arrest. The facts of the case are described by the Court of Appeals as follows:

> On January 15, 1991, Seattle police executed a search warrant at 1115 Yakima Avenue South, number 3. The search warrant instructed the officers to search the premises for narcotics, and it authorized the officers to seize: "[c]ocaine, other controlled substances, narcotics paraphernalia, records of sales of narcotics, packaging material to package narcotics, papers of dominion and control, weapons used to protect narcotics sales, money from the sale of narcotics."
>
> Upon entering the residence [one of the officers] found a man, later identified as Galbert, alone in the living room. [The officer] told Galbert to lie face down on the ground, which Galbert did; the officer handcuffed Galbert's hands behind his back. [The officer] then performed a "quick around the mid-section check to make sure there [were] no easily accessible weapon[s]." He found none. [Another officer] found another person, Gwendolyn Kibby, in the rear bedroom of the house and handcuffed her. The officers also found Kibby's two small children.
>
> Once the officers had the residence secured, they did another "walk through" to look for narcotics and other people. At this time [the second officer] noticed marijuana cigarettes and a foil pipe on the table "less than two feet" from Galbert. [The officer] testified these were the only items he found during the "walk through" that indicated Galbert might be involved in criminal activity.
>
> [The second officer] then returned to Galbert, stood him up, and performed a second frisk. Upon feeling "a lump" in Galbert's front right pants pocket which [the

officer] "thought . . . could have been a weapon of some type", [the officer] reached in Galbert's pants pocket and retrieved the object, which later proved to be rock cocaine. Galbert subsequently was arrested and charged with possession of cocaine.

Basing its decision in large part on its reading of the State Supreme Court precedent of State v. Broadnax, 98 Wn.2d 289 (1982) Feb. '83 LED:05, the Court of Appeals explains its suppression ruling as follows:

> Although probable cause is generally required to perform a search and seizure, under narrowly drawn and carefully circumscribed circumstances lesser cause suffices. An officer may frisk a person for weapons if the officer has reasonable grounds to believe the person is armed and dangerous. The officer "must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." "A 'generalized suspicion' is insufficient to justify a frisk" . . . even when a person is present at a location the police are authorized to search by a valid warrant.
>
> In the case at bar, the State contends there were reasonable grounds to refrisk Galbert based on the trial court's adoption of [the first officer's] testimony that it is "very common" to find weapons in homes for which narcotics warrants have been issued. Furthermore, the State argues, officer safety concerns justified a second frisk because Galbert could have reached into his pockets and retrieved a weapon.
>
> We note first that the trial court made no finding that Galbert posed a threat to [the second officer]. Galbert had already been frisked by [the first officer]. There is nothing in the record to suggest that the first frisk was not sufficient. Moreover, [the second officer] never testified that, despite [the first officer's] initial frisk and Galbert being handcuffed lying prone on his face on the floor, there was reason to fear Galbert was armed and "presently dangerous to the officer or to others". In fact, the record would not support such a claim. There is no evidence that Galbert made any gestures or threats that would have led the officers to believe that he was presently dangerous, and it is not likely that Galbert could have done so while handcuffed and lying prone on his face on the floor. Galbert testified that he never made any surreptitious movements, and that while handcuffed he could not reach his front pants pocket even if he wanted to.
>
> Moreover, other factors indicate that Galbert was not armed and dangerous: Galbert did not ignore the officer's request to get down on the ground; he did not flee when the officer approached; and there is no evidence that his clothing could have facilitated concealing a weapon.
>
> Given the total absence of evidence that Galbert made any sign that conceivably could have been interpreted as an attempt to retrieve a weapon, any safety concern based on the fear that he would do so lacked an objective basis and hence was unreasonable. Thus, we hold that the second frisk by [the second officer] and subsequent search was not authorized by Terry and was therefore constitutionally invalid.

[Citations omitted]

Result: King County Superior Court conviction for possession of a controlled substance reversed.

LED EDITOR'S COMMENT: We have our doubts about the result in this case. The State Supreme Court has declared that a frisk is lawful as long as there is some objective basis that shows that the frisk was not "arbitrary or harassing" in nature. See State v. Collins, 121 Wn.2d 168 (1993) July '93 LED:07. Here, the officer gave what seems to us to be an objective basis for the second frisk, at least if we assume that the first frisk was lawful. We think that the State Supreme Court would uphold such a frisk if it were to choose to review this case.

Having stated our view that the State Supreme Court would probably have upheld this frisk, we would also remind officers that they should be aware that on a case-by-case basis they will have to state their reasons for conducting frisks. Even in the execution of a narcotics search warrant, the Washington courts, based on State v. Broadnax, 98 Wn.2d 289 (1982)(see Feb. '83 LED:05), require that the frisking officer state an objective, particularized basis (for example, prior intelligence about weapons or assaultive tendencies of particular occupants, or on-the-spot observations of suspicious bulges, furtive gestures, hostile language, etc) to justify frisking persons not specifically named as subjects to be searched under the warrant.

Courts in other jurisdictions read the Fourth Amendment less restrictively than our State Supreme Court did in Broadnax (see LaFave, Search and Seizure, 2d. Ed., section 4.9(d) and cases cited therein under notes 69 and 70). In fact, we believe that the majority view from other jurisdictions is that officers may automatically frisk all adult occupants in a private home being searched for narcotics under a warrant, and we hope that Washington prosecutors are looking for a likely case to take to the State Supreme Court to overturn Broadnax. Nonetheless, Broadnax has been on the books for over ten years and Washington officers must be mindful of its requirement that they articulate case-specific reasons for frisking a particular person, even in the execution of narcotics warrants.

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TAKING A SECOND LOOK AT PERSONAL PROPERTY PREVIOUSLY TAKEN FROM A JAILED ARRESTEE AT BOOKING -- NO WARRANT REQUIRED BUT PC MAY BE REQUIRED -- Recently, we were asked in a classroom setting whether a search warrant is required for a second look in the property box at items taken from an arrestee during the jail booking process. With some uncertainty because we had not looked at that issue for some time, we answered that the safest thing to do is to get a search warrant.

Now, having done some further research on the issue, we believe that a search warrant is not needed in this setting (although it never is a bad idea to get a search warrant). The real question is whether probable cause is required. If an officer has probable cause to believe that a particular item in the property box is of evidentiary value, then it seems to be accepted by all courts and commentators that have looked at the question that under a "plain view"-related theory the item can be taken from the property box and either: (a) searched further (e.g., subjected to testing) and/or (b) used as evidence. On the other hand, where the officer has less than probable cause to believe that the item has evidentiary value and needs a "second look" to make that determination, the courts and commentators are split -- most courts believe that the U.S. Supreme Court decision in U.S. v. Edwards, 415 U.S. 800 (1974) authorizes a "second look" even without

probable cause (under the rationale that no privacy protection exists in such inventoried items which could have been thoroughly searched at arrest). A few courts, and all commentators we have read, believe that Edwards did not squarely address this situation, and that such non-PC fishing expeditions are unlawful.

Officers should assume that PC is required for a second look. This suggestion is based upon the following. While no Washington Supreme Court decision has ever so held, there is a lone concurrence by Justice Utter to this effect in State v. Simpson, 95 Wn.2d 170 (1980) April '81 LED:04, and there is dicta (language unnecessary to the Court's ruling) in one State Supreme Court opinion which erroneously describes Utter's seemingly lonely view in Simpson as being the holding in that case. See State v. Boland, 115 Wn.2d 571, (1990) Jan. '91 LED:02. Justice Utter also declares the minority view he took in Simpson to be the law in his law review article on Search and Seizure in the 1988 UPS Law Review, Volume 11, No. 3. For a recent court decision addressing this issue, see the 12/21/93 Wisconsin Court of Appeals decision in State v. Jones, 54 CrL 1345 (Wis. 1993)(rejecting an argument is needed for such a "second look").

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CORRECTION NOTICE

In the February '94 LED "Table of Contents" at page 2, we erroneously stated that in the case of Mairs v. DOL the driver's license revocation of Mairs was affirmed by the Court of Appeals. In fact, DOL's revocation in Mairs had been set aside by the superior court and this ruling was affirmed by the Court of Appeals. The LED subheading re: Mairs at page 18 of the February LED does not repeat this error.

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NEXT MONTH

In the April '94 LED, among other things, we will address the Federal "Brady Handgun Control Act" (Brady Bill) and the requirements it imposes on gun dealers in checking criminal records of gun purchasers and the role of local law enforcement agencies in that process. The Brady Bill [Public Law 103-159, 107 Stat. 1536 and implementing regulations] take effect February 28, 1994 . . .We will also digest recent Court of Appeals decisions in: (1) State v. Cissne, __ Wn. App. __ (Div. III, 1994) -- No. 12177-1-II (holding that horizontal gaze nystagunus (HGN) testing evidence is scientific testing and therefore subject to "Frye" standards for admission of testimony about scientific tests, and addressing, but failing to resolve, the question of whether such HGN evidence should have been admitted as proof of intoxication in Cissne's DWI prosecution; and State v. Schatmeier et. al., __ Wn. App. __ (Div. III, 1994 -- No. 12284-1-III, et. al.) (addressing the propriety of including "adult court declination" language in Miranda warnings to juveniles arrested for DWI).

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.